U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

September 22, 2016

BY ECF

The Honorable P. Kevin Castel
United States District Judge
Daniel Patrick Moynihan Federal Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: United States v. Gary Hirst,
15 Cr. 643 (PKC)

Dear Judge Castel:

The Government writes in connection with the Court's proposed charge to the jury.

Conscious Avoidance

The Government believes that a conscious avoidance instruction is appropriate and has no objection to the conscious avoidance instruction contained in the Court's proposed charge.

A conscious avoidance charge is properly given where the defendant has asserted "the lack of some specific aspect of knowledge required for conviction" and there is "an appropriate factual predicate for the charge, i.e., the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *United States* v. *Fofanah*, 765 F.3d 141, 144 (2d Cir. 2014) (per curiam) (internal quotation marks and ellipsis omitted), *cert. denied*, 135 S. Ct. 1449 (2015); *accord, e.g., United States* v. *Cuti*, 720 F.3d 453, 463 (2d Cir. 2013). Such an instruction is appropriate because "in addition to actual knowledge, a defendant can also be said to know a fact if he 'is aware of a high probability of its existence, unless he actually believes that it does not exist.'" *United States* v. *Reyes*, 302 F.3d 48, 54 (2d Cir. 2002) (quoting *Leary* v. *United States*, 395 U.S. 6, 46 n.93 (1969)).

Here, the evidence is such that a rational juror could appropriately conclude that Hirst was aware of a high probability that the Shahini shares were fraudulently issued. Among other reasons, the existence of Shahini's consulting agreement (purportedly signed on January 22, 2010) was not disclosed by Gerova in its April 23, 2010 letter to the New York Stock Exchange ("NYSE") in which Gerova provided a listing of its existing consulting agreements. This NYSE letter was submitted over Gary Hirst's signature. A jury could appropriately conclude that Hirst was aware of a high probability that the Shahini shares were fraudulently issued when he issued 5,333,333 shares to Shahini in May 2010, when the purported existence of the obligation that led to the issuance of such shares arose in January 2010, but was apparently unknown to Hirst in April 2010, at the time the NYSE letter was sent. Further, a jury could appropriately conclude that Hirst willfully blinded himself to the fraudulent nature of Shahini's shares from the fact that Hirst directed the issuance of 5,333,333 shares of Gerova to Shahini within days of also directing Gerova's transfer agent to cancel 5,333,333 shares surrendered as part of Marshall Manley's severance arrangement in connection with his firing. A jury could appropriately conclude that the highly unlikely coincidence of the cancellation and issuance of the exact same number of shares within the same week appropriately put Hirst on notice of the fraudulent nature of the Shahini transaction. Each of these reasons, among others, supports the provision of a conscious avoidance instruction to the jury.

Although Hirst cites to both *United States* v. *Bonventre*, 10-cr-228 (LTS) (S.D.N.Y. Mar. 17, 2014) and *United States* v. *Stewart*, 15-cr-287 (LTS) (S.D.N.Y. Jul. 1, 2016) as support for his proposed conscious avoidance instruction, the conscious avoidance instructions given in both of those cases were more streamlined than the instruction proposed by Hirst and Hirst has pointed out nothing that is deficient about the Court's proposed conscious avoidance instruction. In *Stewart*, the Court instructed the jury as follows:

> As I have explained, all of the counts charged require the government to prove that Mr. Stewart acted knowingly. In determining whether Mr. Stewart acted knowingly, you may consider whether Mr. Stewart deliberately closed his eyes to what otherwise would have been obvious. The following instructions apply only to the knowledge element of the crimes and not to the question of the defendant's intent.
>
> I would like to point out that the necessary knowledge on the part of Mr. Stewart with respect to any particular charge cannot be established by showing that the defendant was careless, negligent or foolish. However, one may not willfully and intentionally remain ignorant of a fact material and important to his conduct in order to escape the consequences of criminal law.
>
> Thus, if you find, beyond a reasonable doubt, that at the time Mr. Stewart provided confidential information to his father, Mr. Stewart was aware that there was a high probability that his father would, directly or indirectly, trade in securities based on the confidential information Mr. Stewart shared with him, but that Mr. Stewart deliberately and consciously took action to avoid learning the truth of that fact, then you may find that the defendant had knowledge of that material fact.
>
> In other words, a defendant cannot avoid criminal responsibility for his own conduct by deliberately closing his eyes or remaining

> purposefully ignorant of facts which would confirm to him that he was engaged in criminal conduct.
>
> However, if you find that Mr. Stewart actually believed that his father was unlikely to trade or cause trading on the basis of the information, he may not be convicted.

(Trial Tr. 1618-19).

In *Bonventre,* the Court provided the following instruction:

> As I have explained, each Count charged in the Indictment requires the Government to prove beyond a reasonable doubt that each individual Defendant that you are considering acted "knowingly," because he or she had knowledge of particular material facts. In determining whether a Defendant acted knowingly, you may consider whether he or she deliberately closed his or her eyes to what would otherwise have been obvious to him or her, and acted with deliberate disregard of the facts. However, I caution you that the Government cannot prove a Defendant's knowledge of a particular fact merely by showing that the Defendant was careless, foolish, negligent, inattentive or reckless. To find knowledge on this basis, it is not sufficient that the particular Defendant may not have tried hard enough to learn the truth.
>
> Thus, if you find there is proof beyond a reasonable doubt that the Defendant you are considering was aware of a high probability of a material fact's existence, and that he or she consciously and deliberately took action to avoid learning the truth of that fact, you may find that the Defendant had knowledge of that material fact. However, if the Defendant actually believed that a particular material fact did not exist, then you may not conclude that he or she acted knowingly, and you must acquit.
>
> It is entirely up to you, as the judges of the facts, to determine whether the Defendant deliberately closed his or her eyes and any inferences to be drawn from the evidence on this issue. Lastly, in the context of a conspiracy, if you find that a conspiracy existed, before you may convict any Defendant you must find that the particular Defendant you are considering knew there was an illegal conspiracy and that he or she intentionally joined it. You may not apply the principle of conscious avoidance as I have defined it to decide whether or not the Defendant you are considering intentionally joined a conspiracy. You may, however, find that the Defendant joined the conspiracy even if he or she did not actually know the details of the conspiracy's aims or unlawful objectives, if

> you find that the Defendant consciously and deliberately avoided knowing the truth about the conspiracy's aims and objectives.

Bonventre, ECF Docket No. 773.

For the reasons set forth above, the Government believes that a conscious avoidance instruction is appropriate and asks that the Court provide the instruction that is already included in the Court's proposed jury charge.

Defense Theory of the Case

The Government has no objection to this proposed instruction.

Respectfully submitted,

PREET BHARARA
United States Attorney

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